SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-177

ALEJANDRO GARCIA and MICHAEL LEHMANN,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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TABLE OF CONTENTS

	Page
CITATION TO OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	29
APPENDIX A	1a
APPENDIX B	14a

CITATIONS

Cases:

American Communications Ass'n. v. Douds, 339 U.S. 382 (1950) . . . 8

Aptheker v. Secretary of State, 378 U.S. 500 (1964) . . . 24, 27

Arroyo v. United States, 359 U.S. 419 (1959) . . . 24

Bigelow v. Virginia, __ U.S. __, 43 Law Wk. 4734 (June 16, 1975) . . . 7, 15, 26, 28

Brandenburg v. Ohio, 395 U.S. 444 (1969) . . . 7, 8, 12, 15

Page

California v. La Rue,
409 U.S. 109 (1972) 29

Chaplinski v. New Hampshire,
315 U.S. 568 (1942) 7

Cherry v. Maryland,
306 A.2d 634 (1973) 16

Cohen v. California,
403 U.S. 15 (1971) 6, 7, 8, 13

Commonwealth v. Parsons,
69 Montg. Co. L.R. 225 (1953), 51 A.L.R.2d 955 . . . 12

Connally v. General Constr. Co.,
269 U.S. 385 (1927) 28

District of Columbia v. Carter,
409 U.S. 418 (1973) 22

Dombrowski v. Pfister,
380 U.S. 479 (1965) 18, 24, 27

Eisenstadt v. Baird,
405 U.S. 438 (1972) 17, 18, 21, 29

Erznoznik v. City of Jacksonville,
__ U.S. __, 43 Law Wk. 4809 (June 23, 1975) . . . 24

Fox v. Washington,
236 U.S. 273 (1914) 15

Garner v. Louisiana,
368 U.S. 157 (1961) 21

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 7

Page

Giboney v. Empire Storage Co.,
336 U.S. 490 (1949) 7

Gooding v. Wilson,
405 U.S. 518 (1972) 27

Grayned v. City of Rockford,
408 U.S. 104 (1972) 27

Griswold v. Connecticut,
381 U.S. 479 (1965) 17, 18, 29

Harris v. United States,
315 A.2d 569 (1974) 18

Hepburn v. Ellzey,
2 Cranch 445 (1805) 22

Hess v. Indiana,
414 U.S. 105 (1973) 6, 8

Lewis v. New Orleans,
415 U.S. 130 (1974) 27

Miller v. California,
413 U.S. 15 (1973) 7

NAACP v. Button,
371 U.S. 415 (1963) 9

National Mutual Ins. Co. v. Tidewater Transfer Co.,
337 U.S. 582 (1949) 22

O'Donoghue v. United States,
289 U.S. 516 (1933) 22

Palmer v. Lenovitz,
35 App. D.C. 303 (1910) 10

Page

Palmore v. United States,
411 U.S. 389 (1973) 22, 23

People v. Dessus,
12 Puerto Rico 330 (1907) 12

Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,
413 U.A. 376 (1973) 7

Rex v. Higgins,
102 Eng. Reprint 269 (1801) 16

Riley v. United States,
298 A.2d 228 (1972), cert. den.,
414 U.S. 840 (1973) 6

Roe v. Wade,
410 U.S. 113 (1973) 17, 18

Rosenfeld v. New Jersey,
408 U.S. 901 7

Roth v. United States,
354 U.S. 476 (1957) 7, 17

Scales v. United States,
367 U.S. 203 (1961) 24

Shapiro v. Thompson,
394 U.S. 618 (1969) 17

Smith v. Goguen,
415 U.S. 566 (1974) 27

Southern Promotions, Ltd. v. Conrad,
__U.S.__, 43 L.Ed.2d 448 (1975) 28

Page

Stanley v. Georgia,
394 U.S. 557 (1969) 13, 18, 29

State v. Boyd,
86 N.J.L. 75, 91 A. 586, 51 A.L.R.2d 958 (1914) . . 12

State v. Schleifer,
99 Conn. 432, 121 A. 805 (1923) 12, 15

Truax v. Raich,
239 U.S. 33 (1915) 17

United States v. Davis,
83 U.S. App. D.C. 99 (1948), 167 F.2d 228 10

United States v. Halseth,
342 U.S. 277 (1952) 23

United States v. Lyles,
4 Cranch C.C. 469, 26 Fed. Cases 1024 (1834) 10

United States v. McKean,
338 A.2d 439 (1975) 18

United States v. Wiltberger (US),
5 Wheat 76 . . . . . 23, 24

Valentine v. Christensen,
316 U.S. 52 (1942) 15

Whitney v. California,
274 U.S. 357 (1927) 15

Statutes:

22 District of Columbia Code 1112(a)
(1973 Ed.) 2, 3, 4, 9, 10, 11, 24, 25, 26, 28

Page

84 Stat. 473, *et seq.* 22

Other Authorities:

AM. JUR. 2d 10, 14

A.L.R. 14, 15, 16

A.L.R. 2d 14, 17

Arnold, *Criminal Attempts – The Rise & Fall of an Abstraction,* 40 Yale L.J. 53 (1930) 14, 19, 20

Curran, *Solicitation: A Substantive Crime,* 17 Minn. L. Rev. 499 (1933) 10, 14

EMERSON, TOWARDS A GENERAL THEORY OF THE FIRST AMENDMENT 93 (Vintage Ed. 1966) . 8, 17

Frantz, *The First Amendment in the Balance,* 71 Yale L.J. 1424 (1962) 8

HART, LAW, LIBERTY & MORALITY 22 (1963) . . . 17

LASKI, LIBERTY IN THE MODERN STATE 123 (1949) . 20

Magruder, *Mental & Emotional Disturbances in the Law of Torts,* 49 Harv. L. Rev. 1033 (1936) 5

Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970) 24

POLANYI, THE LOGIC OF LIBERTY 158 (1958) . . . 19

PROSSER, TORTS (1941 Ed.) 5

Page

Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code*, 61 Colum. L. Rev. 571 (1961) 10, 12, 15

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioners Alejandro Garcia and Michael Lehmann pray that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above-entitled case on April 1, 1975.

CITATION TO OPINION BELOW

The opinion of the District of Columbia Court of Appeals is reproduced in the appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Is the noncoercive verbal communication to a willing listener of a desire for private, noncommercial, sexual congress an expression protected by the First Amendment?

2. In light of the District of Columbia Court Reform and Criminal Procedure Act of 1970 is the Supreme Court bound by the construction placed on a federal statute referable only to the District of Columbia Court of Appeals? If not, is the construction undertaken in this case of D.C. Code § 22-1112 (a) an impermissible legislative act?

3. May a defendant who claims a statute is overbroad be deprived of the special standing benefits of the overbreadth doctrine merely because he *also* contends that his own speech is constitutionally protected?

4. Is the prohibition of D.C. Code § 22-1112(a) against "any lewd, obscene, or indecent sexual proposal" constitutionally defective on account of its overbreadth?

STATEMENT OF THE CASE

Having been charged by information under D.C. Code § 22-1112(a) with the making of a "lewd, obscene and indecent sexual proposal,"* each petitioner filed a motion to dismiss the information before the Superior Court of the District of Columbia. Each claimed that the statute was overbroad, unduly vague and that the exercise of speech of which he stood accused was protected by the First Amendment. The trial court conducted a hearing at which through stipulation and testimony the government's evidence was adduced as a factual context in which to consider the motions.

The evidence established in substance that on different and unrelated occasions each petitioner had encountered on the public sidewalk a member of the local police department disguised as a civilian. In each instance there ensued a friendly and fairly extensive colloquy. The undercover officer and the petitioner Garcia even went together to a nearby "adult" bookstore where they viewed some of the coin-operated movies. In due course each petitioner asked the officer where he was staying and the latter told him that he had a room at a named hotel within easy walking distance. Each petitioner then asked the officer if they could repair to his room and was in turn asked "why" he wanted to go there or "what he wanted to do?". In the case of Garcia this last inquiry was not made until the two had actually reached

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* The operative part of the statute provides that it "shall not be lawful for any person to . . . make any lewd, obscene, or indecent sexual proposal." The informations in question, apparently routinely, charged each petitioner with having made a "lewd, obscene *and* indecent sexual proposal," rather than employing one of the disjunctive statutory ~~objectives~~ adjectives.

the lobby of the hotel where the officer was supposedly residing; in the case of Lehmann the query came while they were still conversing on the sidewalk. In each instance, the petitioner replied that he "wanted" to engage in sexual congress, including fellatio. Thereupon each petitioner was arrested for having advanced these verbal proposals. There was no claim or evidence of any coercive or illicit action on the part of either petitioner, and the allegedly unlawful proposals contemplated in each instance a purely private, consensual and noncommercial *liaison*.

The arresting officer also disclosed in testimony that the Morals Division, for which he worked, had provided him no specific training as to enforcement of D.C. Code § 22-1112 (a) nor were there any officially-prescribed standards as to its meaning. In response to a question as to whether the statute would apply to a verbal proposal by a husband to his wife that they go to their home for sexual congress, he testified that "I don't know." (Tr. 31).

The trial court granted petitioners' motions and dismissed the informations. On appeal by the government the District of Columbia Court of Appeals reversed. In an effort to repair the vagueness of the statute the appellate court restricted its applicability to the solicitation of three statutory offenses: sodomy, indecent exposure and indecent sexual acts with children. It did not specify any particular referent for each of the three adjectives of 22-1112(a), in effect holding that the statutory phrase "lewd, obscene and indecent" applies as a whole to each of the three substantive crimes.* Tacitly acknowledging that the evidence disclosed no likelihood of imminent lawless action, the court nonetheless concluded that there is "a significant distinction" between the

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* Thus rendering superfluous two of the statutory adjectives.

"advocacy" and "solicitation" of sodomy. The latter it declared to fall within a category of speech not protected by the First Amendment. It likewise deemed it a fact of "no legal significance" that the alleged proposals would, if acted upon, have involved noncommercial sexual acts in private between consenting adults.

From this decision petitioners seek the review of this Court. The date by which this petition might be filed was extended to August 1, 1975 by order of Chief Justice Burger entered on June 18, 1975.

REASONS FOR GRANTING THE WRIT

I

This Court has not hitherto examined the interrelation between the common law concept of solicitation and contemporary First Amendment principles, far less in a case involving state suppression of something so basic in our society as the expression of human sexual needs. These issues are of major doctrinal and vast practical importance to the administration of criminal justice throughout the United States.

The instant case is something of an anomaly. The petitioners have been held criminally liable for the utterance of words which do not even constitute a civil wrong.[1] The forbidden words were uttered in a social context to a policeman masquerading as a private citizen who not only consented to listen to the forbidden words but whose business it

[1] "Thus far it has been held that no action will lie for the insult involved in inviting a woman to illicit intercourse, 'the view being apparently, that there is no harm in asking'." PROSSER, TORTS 64-65 (1941 Ed.) Dean Prosser cited the celebrated article by the late Judge Magruder, "Mental & Emotional Disturbances in the Law of Torts", 49 Harv. L. Rev. 1033, 1055 (1936).

was to induce them by his feigned cordiality. What was said was nothing more nor less than an expression of sexual desire from one human to another.

Like *Cohen v. California*, 403 U.S. 15 (1971), then, the immediate results of this case "may seem at first blush . . . inconsequential.. . . but the issue it presents is of no small constitutional significance."[2]

Nonthreatening Expressions of Sexual Desire, At Least in the Absence of an Unwilling Listener, Must Be Protected by the First Amendment

"It hardly needs repeating that '[t]he constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech'." *Hess v. Indiana*, 414 U.S. 105, 107 (1973). These narrowly limited classes are those instances "where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form

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[2] The District of Columbia Court of Appeals seems to be the first to have dealt with the precise First Amendment issue at hand, although substantial equivalents of D.C. Code 22-1112(a) appear on the books of most states. In *Riley v. U.S.*, 298 A.2d 228 (1972), cert. den., 414 U.S. 840 (1973), the court affirmed the conviction of a defendant for his proposal of sodomy to an undercover policeman, under D.C. Code § 22-2701 which makes it unlawful ". . . to invite, entice, persuade, or to address" anyone for any "immoral or lewd purpose." Although the proposal involved consensual sodomy it also specified a public place for the consummation of the act and was followed by overt actions in preparation thereof. The court's holding that the common-law solicitation is, *per se*, proof against First Amendment protection has since been followed by the Maryland Court of Special Appeals in a case involving statutory solicitation for prostitution. *Cherry v. Maryland*, 306 A.2d 634 (1973).

was employed." *Cohen v. California, supra,* at p. 20. In its most recent catalogue of these "unprotected" forms of speech, as they are often called, the Court mentioned:

> ". . . fighting words, *Chaplinski v. New Hampshire,* 315 U.S. 568, 572 (1942); or obscenity, *Roth v. United States,* 354 U.S. 476, 481-485 (1957); *Miller v. California,* 413 U.S. 15, 23 (1973), or libel, *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), or incitement, *Brandenburg v. Ohio,* 395 U.S. 444 (1969). . .". *Bigelow v. Virginia,* __U.S. __, 43 Law Wk. 4734, 4737 (June 16, 1975).

Speech "brigaded with action," *Brandenburg v. Ohio, supra,* at 395 U.S. 456 (Douglas, J. dissenting), as in the long line of "free speech plus" picketing decisions, *e.g., Giboney v. Empire Storage Co.,* 336 U.S. 490, 501 (1949), and perhaps certain forms of public commercial communication, compare *Bigelow v. Virginia, supra,* with *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376 (1973), have been held subject to governmental regulation provided the public interest outweighs the risks of incidental encroachment upon free speech.

But we know of no decision under contemporary constitutional standards in which this Court has sanctioned a state criminal prohibition of personal speech qua speech (*i.e.,* in which what the "State sought to punish [was] the fact of communication" itself, *Cohen v. California, supra,* at 403 U.S. 18) unless it fell into one of the "unprotected" categories. Some members of the Court have in recent years intimated that another category might yet be recognized for "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience," *Rosenfeld v. New Jersey,* 408 U.S. 901, 905 (Powell, J. dissenting)

based on a kind of shock-value theory of the words used, or "a showing that substantial privacy interests are being invaded in an essentially intolerable manner," *Cohen v. California, supra,* at 403 U.S. 21. Even if confirmed by the Court, however, such a category would be altogether inapposite to the case at bar in which the disguised policeman was decidedly a willing audience and his sensibilities were in no sense shocked by the sort of friendly sidewalk conversation he was paid by the government to engage in. As for the presently recognized categories, on the other hand, the only two even arguably relevant here are "obscenity" and "incitement." The District of Columbia court was tempted to, but did not, rely upon the former. Slip Op., 11 In light of *Cohen v. California* and *Hess v. Indiana, supra,* it could not legitimately have decided otherwise. "Incitement," on the other hand, is a one-word shorthand for the doctrine enunciated in a long line of cases culminating in *Brandenburg v. Ohio, supra,* 395 U.S. 444, 447 (1969):

> ". . . the principle that the constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

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[3] The broad distinction has been said to lie between regulations operating directly upon speech and those operating indirectly. As to the latter ever since *American Communications Ass'n v. Douds,* 339 U.S. 382 (1950), "a majority of the Supreme Court has employed the *ad hoc* balancing test as the formula for solving the problem." EMERSON, TOWARDS A GENERAL THEORY OF THE FIRST AMENDMENT 93 (Vintage Ed. 1966), citing Frantz, "The First Amendment in the Balance," 71 Yale L.J. 1424, 1426 (1962).

Again the "unprotected" category does not embrace the "forbidden words" uttered here. Even assuming *arguendo* that petitioners' "proposals" were directed to inciting imminent lawless action such action was not – and could not have been – "likely" to occur. The friendly conversationalist to whom alone the words were directed was a policeman and presumably under instructions to make arrests immediately upon eliciting the supposedly illegal words (and before consummation of the supposedly illegal deeds), as he in fact did.

It is therefore plain that the spoken words for which petitioners were arrested do not fall within any recognized category of unprotected speech and are presumptively immune to state prosecution. The answer of the District of Columbia court to this problem was to declare that the "proposals" interdicted by 22-1112(a) are "solicitations to commit lewd, obscene or indecent sexual acts which if accomplished would be punishable as a crime," and that it is "the concept of solicitation, itself punishable as a crime at common law, which removes proposals to commit sodomy from First Amendment protection." Slip Op., p. 6, 11 Its rationale consisted of two easy steps: first an equation of the statutory "proposals" with "solicitation," and, second, the assertion that because "solicitation" is a common law crime it is, *ipso facto*, an exception to the protection of the First Amendment. Although admirably simple, such an approach is not, we think, constitutionally elegant. The mere invocation of a common law category or classification of offense does not, without more, dispel all underlying First Amendment issues. Nothing is clearer than that "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963) The

court's rationale is really a legal fiat and its conclusion only the beginning of constitutional analysis.[4]

The fiat is buttressed with certain solecisms and oversights. The court does not claim, nor could it, that when in 1953, Congress enacted the relevant part of 22-1112(a) it intended it to be declarative of the common law of solicitation or to be equated with the "concept of solicitation." Congress had already provided that the "common law" should remain in force within the District except as superseded by statute. D.C. Code § 49-301 (1973 Ed.). This included the common law of crimes, *e.g., United States v. Davis,* 83 U.S. App. D.C. 99, 167 F.2d 228 (1948); *Palmer v. Lenovitz,* 35 App. D.C. 303 (1910), and specifically the common law of solicitation. *United States v. Lyles,* 4 Cranch C.C. 469, 26 Fed. Cases 1024 (1834) A fair statement of the latter is that "one who incites or solicits another to commit a crime which, either by common law or by statute, is a felony, himself commits the substantive crime of solicitation." 21 AM. JUR.2d §114; see also, Curran, *Solicitation: A Substantive Crime,* 17 Minn. L. Rev. 499, 509 (1933); Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code,* 61 Columbia L. Rev. 571, 622 (1961) (". . . in jurisdictions where

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[4] Indeed, if petitioners' claim were governed by mere terminological classifications they would obviously be entitled to prevail. "Solicitation" is one of those 18th century common law labels invariably defined with extreme circularity, and one of the several synonyms frequently employed by the courts is "incitement." But insofar as speech is alleged to be a criminal incitement it cannot be *constitutionally* outlawed (regardless of the contrary results at common law) except where it threatens to precipitate "imminent lawless *action.*" *Ergo,* since no such threat existed here petitioners' speech was protected. While we do rest in part on this argument, which was elided by the court below, we do not wish merely to match our set of verbalisms against those resorted to in the court's opinion, as this would in turn elide the deeper issues discussed above.

common law offenses persist, solicitations to commit felonies . . . are clearly indictable.") Since by pre-existing Congressional decree solicitation was already a common-law crime, the 1953 Congressional intent, acknowledged by the court, to "broaden" the criminal law and "create a new offense" obviously contemplated something still more sweeping than this common law. So much is not denied by the court although it elects to restrict the reach of the statute in a manner most charitably described as radically inconsistent with the Congressional purpose. The court's Procrustean restrictions generate distinct issues discussed *infra.* For present purposes the point is that the first step in the court's rationale – the likening of the "proposals" statute to "solicitation" – is itself a fiat, not merely unsupported by but squarely contrary to the Congressional intent.[5] The second step – that the abstract common law "concept" of solicitation automatically bars First Amendment protections – is most quickly rebutted by the legions of common law solicitation convictions which on no analysis, not even that of the

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[5] A report mentioned by the court, see Slip Op. 5, n. 6, evinces an intent to cast a wide net with the statutory language which is nowhere defined or restricted in any way. See H. Rep. 538, 82nd Cong., 1st Sess. (1951) Prophylaxis is the reason assigned for the proposed amendments, the Committee quoting with approval the testimony of a witness from the police department that "any perverted-minded individual is a potential rapist if the opportunity presents itself," and adding that through diligent application of the amended section "many offenders who have previously not been adequately dealt with may now be curbed before their impulses lead them to the terrible and extreme crimes of carnal knowledge, rape and homicide." *Id.* at 6 Stereotypic and discredited the committee's sociological assumptions may be; but, whether valid or not, they betray a legislative desire to broaden the reach of 22-1112(a) insofar as possible.

District of Columbia Court of Appeals, could survive contemporary First Amendment standards.[6]

The court also seeks to distinguish the speech at bar from the kind of "advocacy" it considers the First Amendment to reach. This is an "act of public expression . . . not readily disassociated from the arena of ideas and causes, whether political or academic" whereas "solicitation" is said to be an "act of enticing or importuning on a personal basis for personal benefit or gain." Slip Op., 12 But this arid approach to freedom of expression is simply not the law as fashioned by this Court to date. Never has this Court limited the protections of the First Amendment to the ideational content of speech, far less to notions "political" or "academic"; it has instead expressly held that it protects the emotive value of speech as well:

> "[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of realtively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much

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[6] *E.g., State v. Boyd*, 86 N.J.L. 75, 91 A. 586, 51 A.L.R.2d 958 (1914) (mere advocacy of the destruction of private property); *People v. Dessus*, 12 Puerto Rico 330 (1907) (writing of a newspaper article held a solicitation and incitation to riot); *State v. Schleifer*, 99 Conn. 432, 121 A. 805 (1923) (speech during strike held solicitation); see also, *Commonwealth v. Parsons*, 69 Montg. Co. L.R. 225 (1953), 51 A.L.R.2d 955 (solicitation for sodomy held not indictable until the woman indicated that defendant's offer would be accepted)

It is not without interest, also, that the "most prevalent solicitation statutes are those directed against subversive activities or 'criminal syndicalism,'" Wechsler, Jones & Korn, *supra*, at 61 Colum. L. Rev. 623, n. 301, the exact type of "solicitation" that cannot be punished under the First Amendment. *Brandenburg v. Ohio, supra.*

> for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which . . . may often be the more important element . . .". *Cohen v. California, supra,* at 403 U.S. 26; see also, *Stanley v. Georgia,* 394 U.S. 557 (1969)

By its silence the court below deems it irrelevant to constitutional analysis that whatever "enticement" existed here was at least mutual and that the only prospective "personal benefit or gain" for petitioners, aside from the intrinsic rewards of conversation with one they understandably took to be a newfound friend, was that of private, consensual sexual congress. And to define "solicitation" as an "act" when petitioners were arrested solely for the words they uttered is one of those maddening exercises of judicial escapism that it ought to be the first order of business of all courts to abjure, no matter what results they want to reach.

For constitutional purposes it matters not at all whether we label this prosecution one for "solicitation" or for "forbidden words," so long as we remember that the Government is trying to label petitioners as criminals on account of their friendly conversation with a highly willing listener, the functional equivalent of which was: "I would like to go to bed with you." This brings us, we think, to the heart of the matter. If state punishment of this speech is to be countenanced by the "concept" of common law solicitation, what exactly are the state interests served by this concept when arrayed against the personal and social interests served by this kind of speech?

The inchoate crimes of "solicitation" and "attempt" are part of our legacy from the 18th century and in their evolution were intimately bound together. See generally, Curran, *supra*, at 17 Minn. L. Rev. 499 (". . . the line of demarcation between the criminal solicitation and the criminal attempt has not been clearly drawn."); Annots. 35 A.L.R. 961, 51 A.L.R.2d 953; Arnold, *Criminal Attempts – The Rise & Fall of an Abstraction*, 40 Yale L. Journ. 53 (1930); 21 AM. JUR.2d § 113. The very concept of an "inchoate" offense, viewed as one on its way to materialization, is of course something of a contradiction in terms. Among the early Anglo-American courts the view nonetheless crystallized that attempt and solicitation were each substantive offenses and, in due course, that they were distinct from each other. Viewed from hindsight this result was a kind of intellectual hypostatization, a development ascribed by one of our foremost legal theorists to the 18th century "method of legal analysis . . . [which] . . . refused to admit frankly that courts by the exercise of certain limited discretionary power could extend the limits of substantive crimes. To satisfy that habit of mind it became necessary to classify all attempts as a species of substantive crime in themselves." *Arnold, supra*, at 40 Yale L. Journ. 59

The common law solicitation decisions so far examined by us are largely doctrinaire, at least in the sense that they evince a preoccupation with taxonomy or prescription rather than an enunciation of interests served by the doctrine or any explication of its rationale. This is not surprising since the latter analysis is preeminently a tool of American constitutional law and the common law doctrine grew to maturity independently of the Constitution. It appears, also, that this

Court has never definitively assessed the solicitation concept in terms of the First Amendment.[7]

One of the leading cases in this country is *State v. Schleifer*, 99 Conn. 432, 121 A. 805 (1923), in which the defendant was convicted under an indictment for common law solicitation for having made an incendiary speech during a street car strike. Because there was still much uncertainty as to what solicitations were criminal and what were not the Connecticut court enunciated the rule that is now almost universally accepted among the states: "the solicitation to a crime should be of a crime in every instance where to commit the same offense would be a crime." It came closest to an attempted rationale when it observed that:

> "The solicitation to another to a crime is, as a rule, far more dangerous to society than the attempt to commit the same crime. For the solicitation has behind it an evil purpose, coupled with the pressure of a stronger intellect upon the weak and criminally inclined." 35 A.L.R. at 960[8]

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[7] There is, as it happens, one dated precedent of this Court that could be said to support the result reached by the District of Columbia Court of Appeals. This is *Fox v. Washington*, 236 U.S. 273 (1914), affirming a state conviction of a defendant for the publication of an article about his nudist camp, on the assumption that the publication was an incitement of its readers to commit the crime of indecent exposure. Like *Whitney v. California*, 274 U.S. 357 (1927) and *Valentine v. Chrestensen*, 316 U.S. 52 (1942), interred respectively in *Brandenburg v. Ohio*, *supra*, and *Bigelow v. Virginia*, *supra*, *Fox* is a case whose teaching has not survived subsequent decisions of this Court.

[8] "The opposing view" is that solicitation "is not dangerous because the resisting will of an independent moral agent is interposed between the solicitor and the commission of the crime that is his object." Wechsler, Jones & Korn, *supra*, at 61 Colum. L. Rev. 621

The leading English decision is *Rex v. Higgins*, 102 Eng. Reprint 269 (1801), involving a defendant charged under the common law with having solicited a servant to steal his master's goods. The opinion stated that the:

> ". . . offense imputed to this defendant is . . . that, for his own wicked gains, he solicited and incited a servant to rob his master; and can it be a question, in a country professing to have laws subservient to justice and morality, whether this be an offense? . . . It is argued that a mere intent to commit evil is not indictable, without an act done; but is there not an act done, when it is charged that the defendant solicited another to commit a felony? The solicitation is an act, and the answer given at the bar is decisive that it would be sufficient to constitute an overt act of high treason." 35 A.L.R. 965; see also, *Cherry v. Maryland, supra*, at 306 A.2d 637-638

Three ideas emerge from these and similar decisions as possible predicates for the solicitation doctrine: (1) the punishment of evil intent; (2) the equation of solicitation with action (akin to attempts) and (3) the threat to society that the crime solicited will in consequence occur. The first has no place in First Amendment law the very core of whose protections is human thought. The second is inapposite at least to the case at bar which involves only friendly speech.[9]

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[9] The English court's description of solicitation as an "act," a notion echoed in the opinion of the District of Columbia court, was influenced by the fact that speech or discussion could itself constitute one of the "overt acts" required for a conviction of treason. A parallel to this is the fact that conversations may suffice to establish one of the overt acts required to complete the offense of conspiracy. But

(continued)

So also is the third when the friendly speech is addressed to a disguised policeman and the consummation of the proposed crime is, *ex hypothesi*, impossible.[10]

On the other hand, the interests furthered by the speech outlawed by the District of Columbia court are as fundamental, or almost so, as the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969), to pursue a livelihood, *Truax v. Raich*, 239 U.S. 33, 36 (1915), and to reproduce or refrain from so doing. *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965) Sexual needs, unlike the "impulse to steal, wound or even kill," are, after all, a "recurrent and insistent part of daily life." HART, LAW, LIBERTY & MORALITY 22 (1963) And in this Court's own words, human sexuality is a "great and mysterious motive force in human life . . . [of] absorbing interest to mankind through the ages." *Roth v. U.S.*, 354 U.S. 476, 487-488 (1957) That this elemental human need is part of the "affirmation of self", EMERSON, *supra*, 5, and emotive expression entitled to constitutional protection seems to us to be scarcely contestable. This Court has in fact adumbrated as much in such

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[9] (continued) obviously this confuses an *evidentiary* use of speech with a substantive offense. From the fact that speech may satisfy one element of the offense of treason or conspiracy it by no means follows, at least for purposes of American constitutional law, that speech may thereby be transmuted into a punishable offense *as such*.

[10] We are mindful that the defense of impossibility has been widely rejected by American courts dealing with common law solicitations. Annot., *supra*, at 51 A.L.R. 2d 956 This, however, has nothing to do with the assaying of the state interests underlying the solicitation doctrine. The rejection of this defense was not, so far as we have discovered, grounded on any other interests than those mentioned above.

decisions as *Roe v. Wade, Eisenstadt v. Baird, Stanley v. Georgia* and *Griswold v. Connecticut, supra.* By its holding here the District of Columbia court has asserted a power of the state to imprison people for uttering to their companions, within earshot of a police officer, the sort of polite proposal for sexual liaison which is an everyday occurrence in the public bars or restaurants of Washington as in any other city.[11] The chilling effect," *Dombrowski v. Pfister,*

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[11] There is no doubt that this is the import of the holding although momentary confusion may be provoked by a first reading of the court's remarkably cryptic observation that the statute "does not require an open or public act or proposal in the common-law sense and was not designed or intended to apply to acts committed or proposals made 'in privacy in the presence of a single and consenting person.' " Slip Op. 12-13 There is no requirement for an "open or public act or proposal" under the common law of solicitation, people having been convicted for the contents of private letters they wrote or conversations with only one other person. Thus the first clause of the quoted sentence is not readily explainable. To grasp the full meaning of the second, one needs to know that the cited case *(Rittenour v. District of Columbia)* involved a police officer and defendant alone in the latter's home and that privacy protections outside the home have never been recognized by the local court. To the contrary, in two recent decisions it has held that such so-called "privacy" rights cannot, as a matter of law, be asserted in places of public accommodation, such as hotels. *United States v. McKean,* 338 A.2d 439 (1975); *Harris v. U.S.,* 315 A.2d 569 (1974) It is therefore clear that if a man seated at the bar of the Watergate Hotel, say, happened to propose to his female companion that they go up to his room for certain forms of sexual recreation, and their conversation was overheard by a policeman, the District government could send the man to jail for his "obscene, lewd or indecent" sexual proposal. This particular hypothetical fact situation figured prominently in the oral argument before the deciding panel. It appears that the panel decided to excise "fornication" from the statutory class of "obscene, lewd or indecent" suggestions so as to hold harmless what it deemed to be the more traditional modes of human sexual expression both physical and verbal.

(continued)

380 U.S, 479 (1965), of such a law is self-evident and is plainly impermissible if human sexuality is among the social values sheltered by the First Amendment. The precedents of this Court suggest that it is. The case at bar focuses the issue more acutely than any known to us. By accepting it for review this Court would be able to enunciate a principle of first importance toward which our constitutional law has been tending over at least the last decade.

Given the enormous social importance of human sexuality, we think that in the law governing its expression there is no room for the sort of fictional dichotomies glancingly mentioned by the lower court as it struggled to distinguish "advocacy" from "solicitation," public expression vs. private expression, pleading for vs. importuning, etc. Such casuistry is the work of the same "habit of mind" that spawned such unwieldy verbal abstractions as "attempt" and "solicitation" in the first place. See Arnold, *supra*, at 40 Yale L. Jour. 79-80[12] Constitutional analysis must be more realistic and,

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[11] (continued) The validity of this judicial re-engineering of the statute is considered separately *infra;* but the cold fact remains that if the man in our hypothesis used forbidden "sodomitic" words he could be sent to prison under the present decision and the court does not deny it, although its opinion strains hard to blink it.

[12] Nor will it do to confine all permissible human expressions of sexual desire to the narrow confines of the home. "A free society is characterized by the range of public liberties through which individualism performs a social function and not by the scope of socially ineffective personal liberties. Conversely, totalitarianism is not intent on destroying private freedom, but denies all justification to public liberties." POLANYI, THE LOGIC OF LIBERTY 158 (1958)

when undertaken by this Court, usually is.[13] It is a source of national pride that under our system of laws a citizen may urge the forcible overthrow of government itself and do so with impunity until his words threaten imminent lawless action. But if the same law can send a man to jail for his friendly proposal of noncommercial, consensual sexual congress to a willing listener, it becomes parochial in the extreme and no source of pride to anyone. There is a vast doctrinal wrench between these two results. We ask the Court to resolve it through the medium of the case at bar.

II

The District of Columbia court radically recast the statute in an effort to redeem it from unconstitutional vagueness. The court's effort was so extreme that it raises a question as to the power of the judiciary to recast Congressional legislation without itself engaging in legislative action. Closely

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[13] One reason for this, of course, is that the Constitution is an instrument of national government. Its construction thus presupposes, in our system, some interplay of will between the government and the governed. "The power of law to define modes of social conduct depends very largely upon its ability to command a sentiment of general approval. What it seeks to do must broadly commend itself, on rational grounds, to those over whose lives its principles are to preside." LASKI LIBERTY IN THE MODERN STATE 123 (1949)

Because this Court's constitutional analysis does not rest on accumulated verbal "concepts and abstractions," Arnold, *supra*, 40 Yale L. Journ. 79, but seeks instead to isolate and evaluate the underlying tensions of societal and governmental interest, it can of course reverse the result in the present case without thereby disabling the common or statutory law of solicitation for any and all purposes. Solicitations of prostitution or bribes, for instance, are readily distinguishable exercises of commercial speech conjoined with a specific criminal intent, in which the interest in expression is quite different from the interest here.

related is the question of whether the District of Columbia court's interpretation of a Congressional statute referable only to the District of Columbia is binding upon the United States Supreme Court. This latter question has not been decided but is destined to recur in various forms as a result of the District of Columbia Court Reorganization Act of 1970 and should be resolved as soon as possible in the interest of orderly judicial administration within the District.

It is our position that this Court is not bound by the lower court's construction and that this construction was legally indefensible.

This Court is Not Bound by The Lower Court's Construction of the Statute

When reviewing the constitutionality of state laws this Court has generally adhered to a rule that it is "bound by a State's interpretation of its own statute," *Garner v. Louisiana*, 368 U.S. 157, 166 (1961). Although this rule appears to be sometimes relaxed when the state tribunal's interpretation is manifestly unreasonable, see *Eisenstadt v. Baird, supra*, at 405 U.S. 449, the rule would, if applied to District of Columbia court's decision, pose at least a threshhold barrier to the issues of overbreadth and vagueness.[14] That it should

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[14] We may assume *arguendo* that a prohibition against "lewd, obscene, or indecent sexual proposals," meaning "solicitations for sodomy, indecent exposure or indecent liberties with children" as these are elsewhere defined by statute, would not, whatever its other vices, be bad because unduly vague. Whether it would be constitutionally overbroad would depend, we take it, on how clearly the three statutory offenses were defined. One of them, "indecent exposure," is not defined at all, merely outlawed. See D.C. Code § 22-1112. Hence, the issue of facial overbreadth would appear to be reachable, albeit not

(continued)

apply might be suggested by provisions in the District of Columbia Court Reform and Criminal Procedure Act of 1970 (Reorganization Act), 84 Stat. 473, *et seq.*, vesting exclusive nondiversity jurisdiction in the local legislative courts over Congressional acts "applicable exclusively to the District of Columbia," 84 Stat. 590, and declaring that for purposes of this Court's appellate jurisdiction in 28 U.S.C. § 1257 "the term 'highest court of a State' includes the District of Columbia Court of Appeals." *Id.*

The acceptance of such an inroad upon this Court's powers of review is quite unnecessary, however, and would in our estimation be an exceedingly improvident step to take since it is this Court alone which must be the final and definitive expounder of *all* federal law, both statutory and constitutional. The self-imposed limitaton upon this Court's power to construe state legislation rests on considerations of federalism altogether inapposite to Congressional laws referable to the District of Columbia, an entity "truly sui generis in our governmental structure." *District of Columbia v. Carter*, 409 U.S. 418, 432 (1973); see also, *O'Donoghue v. United States*, 289 U.S. 516, 537 (1933); *Hepburn v. Ellzey*, 2 Cranch 445 (1805); cf. *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) These principles seem to us to underlie the decision in *Palmore v. United States*, 411 U.S. 389 (1973), that the aforementioned amendment of 28 U.S.C. § 1257 does not render the District of Columbia a "state" for purposes of this Court's appellate jurisdiction. There the Court said that:

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[14] (continued) on the same terms, whether this Court is bound by the lower court's construction or not. Of course neither vagueness nor overbreadth need be considered if this Court concludes that the speech at bar was itself protected as we contend above.

> "The 1970 amendment . . . plainly provided that the District of Columbia Court of Appeals should be treated as the 'highest court of a State,' but nowhere in § 1257, or elsewhere, has Congress provided that the words 'statute of any state,' as used in § 1257(2), are to include the provisions of the District of Columbia Code. A reference to 'state statute' would *ordinarily not include provisions of the District of Columbia Code, which was enacted, not by a state legislature, but by Congress,* and which applies only within the boundaries of the District of Columbia. The District of Columbia is constitutionally distinct from the States . . . . *Nor does it follow* from the decision to treat the District of Columbia Court of Appeals as a state court *that the District Code was to be considered a state statute for the purposes of § 1257.* (Emphasis supplied) 411 U.S. at 395

If the District of Columbia Code cannot be treated as "state statutes" for purposes of this Court's appellate jurisdiction we think it follows virtually *a fortiori* that this Court should not be bound by a construction of the Code adopted by the District of Columbia Court of Appeals. And although this Court has not yet had occasion to decide the question, we operate on this assumption in what follows.

The Lower Court's Limiting Construction Was Legally Untenable

Few legal rules are more axiomatic than that "it is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger* (US) 5 Wheat 76, 95; *United States v. Halseth*, 342 U.S. 277

(1952), cited with approval in *Arroyo v. U.S.*, 359 U.S. 419, 424 (1959) And although "penal laws are to be construed strictly they are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States v. Wiltberger, supra,* 5 Wheat at 95 This Court when considering federal legislation will often strain to construe it so as to save it from unconstitutionality but, as it has often reiterated, ". . . it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." *Scales v. U.S.*, 367 U.S. 203, 211 (1961), cited in *Aptheker v. Secretary of State,* 378 U.S. 500, 515 (1964) And to save a statute from facial overbreadth it must by its plain terms be "easily susceptible to a narrowing construction." *Erznoznik v. City of Jacksonville,* __ U.S. __, 43 Law Wk. 4809, 4813 (June 23, 1975); *Dombrowski v. Pfister, supra,* at 380 U.S. 497; Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970)

In its zeal to preserve the statute at bar, which even the prosecutor tacitly acknowledged to be defective as it read, the District of Columbia court overstepped all these boundaries and indulged in an impermissible form of judicial re-legislation.

The prosecutor had suggested that the objects of any "lewd, obscene, or indecent sexual proposal" of § 22-1112 (a) be limited to any so-called "sex offense" appearing in the District of Columbia Code. The court adopted the suggestion that the objects of the "proposals" be limited to substantive crimes in the Code but discriminated two classes of such crimes. Proposals for the statutory crimes of sodomy, indecent exposure and indecent liberties with children would be deemed "lewd, obscene, or indecent," it declared, whereas proposals of adultery, fornication, seduction and incest would not. It defended its division on two grounds:

the lack of "convincing evidence" that the statute had ever been applied to proposals in the second category and its own view (not otherwise explained) that § 1112(a) was not "reasonably susceptible" of application to the second category of crimes, those "inherently abhorrent regardless of the sex or relationship of the parties." Slip Op. 7-9

There are several reasons why this rather baroque re-writing of the statute is legally unacceptable.

First, it flies in the face of the Congressional intent, elsewhere acknowledged in the opinion, to broaden the laws against sexual proposals in the District. By Congressional adoption the common law in force in 1953 already forbade the solicitation of any act constituting a felony by statute or common law. Then, as now, adultery, fornication and indecent exposure were misdemeanors, incest, sodomy and indecent liberties with children were felonies and seduction, though labeled a misdemeanor, carried a maximum prison term of three years. Thus some of the sexual proposals already outlawed by common law solicitation (for incest and presumably seduction) are removed by the court's construction from the reach of the statute. Manifestly, this result cannot be squared with the avowed Congressional intention of broadening the class of forbidden sexual propoals through § 22-1112(a).

Second, the two classifications are intrinsically irrational. Proof of the elements of some of the statutory offenses in the first category would also satisfy the elements of some of the statutory offenses in the second. Proof of indecent exposure, for example, could under various readily imaginable circumstances also establish the offenses of adultery, fornication, seduction or incest. The elements of indecent sexual acts with children could likewise also establish the offenses of seduction, fornication and incest. What sense, one might

also ask, does it make to outlaw "proposals" of sexual congress with children except where they happen to be related to the defendant within a prohibited degree of consanguinity? Because the elements of the two sets of crimes are not mutually exclusive the court's constructional division is meaningless. And in any event to impute to the 1953 Congress the unusually nice distinctions now carried out by the court is to "defeat the obvious intention of the legislature."

Third, the court's reliance on a "pattern of enforcement" is misplaced. Regardless of whether this can ever be a sound basis for judicial construction of a statute, the fact is that it is far from clear that prior to this decision § 22-1112(a) had *not* been applied to proposals of offenses in the court's exempted category.

Fourth, the court's reformulation of the statute poses unnecessary constitutional problems under the Equal Protection Clause which the Congress cannot be presumed to have intended. If accepted it would leave people of heterosexual persuasion free to propose activities, albeit extralegal, by which to gratify their erotic needs; but people of homosexual persuasion would not be free to propose the only activities, also extralegal, by which their needs can be gratified. The Court's motivation for arriving at this result is also highly suspect, see footnote 11, *supra,* and appears to have been virtually a calculated arrogation of legislative powers.

The Statute is Fatally Overbroad Either As It Reads or As Construed by the Court

This Court has long recognized that "a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally protected." *Bigelow*

v. Virginia, supra, 43 Law Wk. 4736; *Lewis v. New Orleans,* 415 U.S. 130 (1974); *Gooding v. Wilson, supra; Aptheker v. Secretary of State, supra; Dombrowski v. Pfister, supra.* A statute operating solely upon speech, like the one here, can withstand an attack upon its facial unconstitutionality only if, as authoritatively construed, "it is not *susceptible* of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments. (Emphasis supplied) *Gooding v. Wilson, supra,* at 405 U.S. 520 The reason for this special rule is the "transcedent value to all society of constitutionally protected expression and the understandable fear that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Id.*

When it reached our contention under this head the lower court acknowledged the rule but went on to find it inapplicable here. It said:

> "In these cases, however, it is unnecessary to look beyond the stipulated conduct of appellees since they contendthat the very speech for which they were arrested and charged is itself constitutionally protected." Slip Op. 10-11

It held, in other words, that because petitioners were *also* claiming that theirs was protected speech (as we argue under I, *supra*) they were not entitled to the benefits of the overbreadth doctrine.[15] This is plainly not the law, as this Court

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[15] The lower court's remarkable contraction-by-construction was evidently undertaken in an effort to salvage the statute from *vagueness* only. See, *Smith v. Goguen,* 415 U.S. 566, 572 (1974); *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972).

has most recently reaffirmed in *Bigelow v. Virginia, supra,* 43 Law Wk. 4737, 4737.

It is equally clear that the prohibition of "lewd, obscene or indecent" sexual proposals is void for overbreadth either as Congress wrote it or as reconstructed by the District of Columbia court. The terms are of no clearly fixed import in the ordinary lexical sense, in the specialized usages of the law or in common parlance. In sexual affairs, as in perhaps few other areas of human endeavor, it is a commonplace that public opinion is unbridgeably divided as to what constitutes "lewd, obscene or indecent" proposals. Nor is there any rehabilitative construction which meshes with the unlimited statutory language or intent, or any gloss which provides technical or common law meanings ". . . well enough known to enable those within their reach to correctly apply them." *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1927).

Because the lower court wrongly denied petitioners the benefit of the overbreadth doctrine it makes no answer to this claim. If it is suggested that the court's delimitation of the statute is an answer, it is legally insufficient. We do not think this delimitation was proper or binding upon this Court. If so, the overbreath contention scarcely need be labored. But even if this Court should acquiesce in the unusual construction, the statute is still overbroad for at least two inescapable reasons. First, a solicitation for "indecent exposure," as the lower court would have it, is a boundless offense because the crime of indecent exposure remains undefined by statute. It would therefore be perfectly plausible, for example, that § 1112(a) could be applied to a casting director soliciting actors to perform in the well-known musical *Hair.* That the statute remains susceptible of enforcement against such protected speech, cf. *Southeastern Promotions, Ltd. v.*

Conrad, ___ U.S.___, 43 L.Ed.2d 448 (1975), is undeniable. Second, the statute remains applicable to proposals for private consensual sexual acts between adults, such, indeed as were involved in the case at bar.

In the wake of the *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Stanley v. Georgia*, *supra*, it seems virtually certain that the state has no legitimate interest in the regulation or prohibition of such acts.[16] As one justice has observed, "I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults." *California v. LaRue*, 409 U.S. 109, 132 (1972) (Marshall, J. dissenting)

CONCLUSION

For the foregoing reasons the petition should be granted.

Respectfully submitted,

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August 1, 1975

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[16] Even the prosecutor at bar has conceded as much by stipulation in open court. See Appendix B, 14a.

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA, APPELLANT,

v.

ALEJANDRO GARCIA (No. 8623),
VINCENT JULIAN HILLIARD (No. 8624),

and

MICHAEL LEHMANN (No. 8625), APPELLEES.

Appeals from the Superior Court of the
District of Columbia

(Argued December 5, 1974 Decided April 1, 1975)

David P. Sutton, Assistant Corporation Counsel, with whom *C. Francis Murphy*, Corporation Counsel, *Louis P. Robbins*, Principal Assistant Corporation Counsel, and *Richard W. Barton*, Assistant Corporation Counsel, were on the brief, for appellant.

Glenn R. Graves for appellees Garcia and Lehmann.

Charles H. Schulze for appellee Hilliard.

Before KELLY and GALLAGHER, *Associate Judges*, and PAIR, *Associate Judge, Retired.*

PAIR, *Associate Judge, Retired*: In these consolidated cases, appellees (defendants) Garcia, Hilliard and Lehmann were each charged by informations filed in the

Criminal Division of Superior Court, with making a "lewd, obscene and indecent sexual proposal in violation of Section 22-1112(a) of the District of Columbia Code".[1] Appellees moved to dismiss the informations claiming that the clause of § 22-1112(a) under which they were charged was unconstitutionally vague and overbroad. Appellees Garcia and Lehmann also claimed there was no corroboration of the sexual proposal, a defense which was not reached below and which we need not consider here because of the court's disposition of the motions on constitutional grounds. After a pretrial hearing on May 28, 1974, Judge Norman granted the motions and dismissed the informations. This appeal by the District of Columbia followed. *See* D.C. Code 1973, § 23-104(c).

For the purposes of the hearing on the motions to dismiss only, appellees stipulated to the facts as represented by the police reports (Form 163) prepared by Officer Andrews who made the arrests. The substance of these reports, as amplified by Officer Andrews' testimony, is as follows:

[No. 8623—Garcia]

At about 10:20 p.m., on April 17, 1974, Officer Andrews, a plainclothes officer assigned to the Prostitution and Perversion Branch of the Metropolitan Police Department's Morals Division, while standing at the corner of 14th and K Streets, N.W., was approached by appellee Garcia who asked the officer to join him in looking at

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[1] D.C. Code 1973, § 22-1112(a) provides:

> It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal . . . in the District of Columbia, under penalty of not more than $300 fine, or imprisonment of not more than ninety days, or both, for each and every such offense.

some movies up the street. The officer at first declined the invitation but after some urging by Garcia, followed him to a nearby bookstore which contained coin-operated movie machines. The two men engaged separate machines. Later, after the officer had engaged another machine at Garcia's suggestion, Garcia "tried to climb in behind [the officer], hunching [him]—at [him]," but was told by the officer to stop. Garcia then asked where the officer was staying, and after being told that it was at the Ambassador Hotel, he asked if the two of them could go to the officer's room there. The officer agreed. As the two were entering the lobby of the hotel, the officer asked Garcia "what he wanted to do." Garcia replied that "he wanted to suck [him] up" or "suck him off" and shortly thereafter was arrested.

[No. 8624—Hilliard]

While walking north in the 500 block of 9th Street, N.W., at about 12:33 a.m., on April 20, 1974, Officer Andrews noticed a man—appellee Hilliard—sitting alone in a parked car. Hilliard motioned the officer over to his car and, after inquiring if "it was getting cold," invited the officer into the car. The officer accepted and got into the car on the passenger side. Hilliard then asked the officer where he was staying and was told that it was at the Ambassador Hotel. Hilliard suggested they could have "fun" in the officer's room there. When Officer Andrews replied that he did not know what Hilliard wanted, Hilliard said "he would suck [him] but he wouldn't take it up the ass." The officer thereupon arrested Hilliard.

[No. 8625—Lehmann]

On April 18, 1974, at about 9:10 p.m., appellee Lehmann approached plainclothes Officer Andrews as he

was walking north in the 400 block of 11th Street, N.W., and asked him how he "was doing" and where he was staying. The officer indicated he was staying at the Harrington Hotel across the street. Lehmann then asked if the two of them could go to the officer's room, and when asked why, Lehmann replied that "he wanted to suck and fuck" the officer. Lehmann was then arrested.

The trial court found these cases "utterly indistinguishable" from *District of Columbia v. Walters*, D.C.App., 319 A.2d 332, *appeal dismissed for want of a properly presented federal question*, —— U.S. ——, 95 S.Ct. 650, 42 L.Ed.2d 661 (1974). In that case this court found unconstitutionally vague the clause of D.C. Code 1973, § 22-1112(a) which proscribed "any other lewd, obscene, or indecent act." Brought into question in the cases at bar is the constitutionality of another clause of § 22-1112 (a), namely, the clause which provides that it shall not be lawful ". . . to make any lewd, obscene, or indecent sexual proposal . . . ." Although the sexual proposal clause of § 22-1112(a) contains the same three adjectives found in the clause struck down in *Walters*, the two clauses are, in our view, clearly distinguishable in terms of constitutional clarity and validity. Consequently, the analysis of the constitutional issues in *Walters*, is not controlling with respect to the constitutionality of the clause of § 22-1112(a) at issue here.

The sexual proposal clause of § 22-1112(a) was successfully attacked below on two grounds, the appellees contending (1) that the statute is overbroad, proscribing speech which is protected by the First Amendment; and (2) that the statute proscribing the conduct charged is unconstitutionally vague and thus violative of the Fifth Amendment. After considering these constitutional arguments, we reverse.

I

The void-for-vagueness doctrine as extensively developed by the Supreme Court is a due process doctrine incorporating notions of fair notice or warning.[2] It requires legislatures "to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'"[3] It is clear from the legislative history of § 22-1112(a), which was enacted in its present form in 1953,[4] that Congress was "deeply concerned with what it termed 'sex offenses' within the District of Columbia and that it *specifically* intended to broaden the offense of indecent exposure and to create a new offense of making a lewd, obscene or indecent sexual proposal."[5] Congress clearly intended that "[t]hrough diligent application of [§ 22-1112] many [sex] offenders who have previously not been adequately dealt with may now be curbed before their impulses lead them to the terrible and extreme crimes of carnal knowledge, rape and homicide."[6] In contradistinction to the clause

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[2] *See Smith v. Goguen*, 415 U.S. 566, 572 (1974). *See generally Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

[3] *Smith v. Goguen*, *supra* at 573.

[4] Act of June 29, 1953, ch. 159, § 202(a)(1), 67 Stat. 92.

[5] *District of Columbia v. Walters*, *supra* at 336 n.7. *See, e.g.*, H.R.Rep. No. 514, 83d Cong., 1st Sess. 4 (1953); H.R. Rep. No. 538, 82d Cong., 1st Sess. 6 (1951). *See also Rittenour v. District of Columbia*, D.C.Mun.App., 163 A.2d 558, 559 & n.3 (1960).

[6] H.R.Rep. No. 538, 82d Cong., 1st Sess. 6 (1951) (discussing H.R. 4141, 82d Cong., 1st Sess. which contained language

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of § 22-1112(a) ("any other lewd, obscene, or indecent act") which this court declared unconstitutionally vague in *District of Columbia v. Walters, supra*, the words "lewd," "obscene" and "indecent" in the clause at issue here are joined with the term "sexual proposal," thereby providing a definite context in which the words can be given meaning.[7]

A sexual "proposal," in the context of § 22-1112(a), connotes virtually the same conduct or speech-conduct as a sexual solicitation; the term clearly implies a personal importunity addressed to a particular individual to do some sexual act.[8] The sexual acts the proposal or solicitation of which are proscribed by § 22-1112(a) are limited to those which are "lewd, obscene or indecent." Furthermore, given the nature of the common law offense of solicitation,[9] it is appropriate to construe the sexual proposal clause of § 22-1112(a) as limited to solicitations to commit lewd, obscene or indecent sexual acts which if accomplished would be punishable as a crime.[10] Thus various "sex related" offenses in the D.C. Code must be examined to see which, if any, fit into this narrow category of conduct.

As we noted in *District of Columbia v. Walters, supra* at 335 n.5, "the common law gives no precise meaning to the words lewd, obscene, and indecent but uses them

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identical to that which was eventually enacted in the 83d Cong.).

[7] *Cf. District of Columbia v. Walters, supra* at 335.

[8] *Cf.* BLACK'S LAW DICTIONARY 1564 (4th rev. ed. 1968).

[9] *See generally* 21 AM. JUR. 2d *Criminal Law* § 114 (1965).

[10] *Cf. Riley v. United States*, D.C.App., 298 A.2d 228, 230-31 (1972), *cert. denied*, 414 U.S. 840 (1973).

as adjectives of general description." However, the Supreme Court has

> . . . consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." [*Roth v. United States*, 354 U.S. 476, 491-92 (1957), quoting *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947).]

There is scant historical evidence of the enforcement of the sexual proposal clause of § 22-1112(a): very few appeals from convictions for making such sexual proposals have been reported,[11] and while all of the reported cases involved "public" acts or proposals, in none of them did the opinion describe the sexual act proposed. In the instant cases, one police officer—the arresting officer—testified that he "believed" he had been trained to interpret the sexual proposal clause of § 22-1112(a) as proscribing public proposals to perform illegal sexual acts, an interpretation which appellant now urges us to adopt. But there is no convincing evidence that the sexual proposal clause of § 22-1112(a) has in practice been so sweepingly applied; nor do we believe the clause reasonably susceptible of such broad application.

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[11] *See Haynes v. District of Columbia*, D.C.App., 202 A.2d 919 (1964) (indecent exposure and indecent sexual proposal); *Goodsaid v. District of Columbia*, D.C.App., 187 A.2d 486, *cert. denied*, 375 U.S. 867 (1963) (indecent sexual proposal); *Howard v. District of Columbia*, D.C.Mun.App., 132 A.2d 150 (1957) (indecent sexual proposal).

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Adultery,[12] fornication,[13] seduction [14] and incest [15] are offenses which derive essentially from a belief in the immorality of heterosexual or natural sexual intercourse

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[12] "Adultery is an offense against the marriage relation, and belongs to the class of subjects which each state controls in its own way." *Southern Surety Co. v. Oklahoma*, 241 U.S. 582, 586 (1916). *See also State v. Ronek*, 176 N.W. 2d 153, 41 A.L.R. 3d 1329 (Iowa 1970); Annot., 41 A.L.R. 3d 1338 (1972).

[13] Fornication has been generally treated as a crime against "public morals." The state's interest has been held to be the prevention of the birth of illegitimate children as well as the prevention of unlawful sexual intercourse. *See, e.g., State v. Barr*, 110 N.J.Super. 365, 265 A.2d 817, 819 (Super Ct., App. Div. 1970), *rev'd on other grounds sub nom. State v. Clark*, 58 N.J. 72, 275 A.2d 137 (1971). *See generally* Annot., 41 A.L.R. 3d 1338 (1972).

[14] "The object of the [seduction] statute is to protect the chaste virgin against betrayal from an honest belief in the betrayer's protestations of love and affection, or an existing promise of marriage, or a present unqualified promise of marriage as an inducement for the commission of [sexual intercourse]." *Hamilton v. United States*, 41 App.D.C. 359, 364 (1914). Seduction is an offense which may be committed against unmarried women only. *See* 79 C.J.S. *Seduction* § 33 (1952).

[15] Incest was not a crime at common law but was punishable as an offense in the ecclesiastical courts of England. In the United States it is a statutory crime, the object being "to prohibit sexual intercourse between those related within prescribed degrees, and thus to promote domestic peace and social purity." 42 C.J.S. *Incest* § 1 (1952). The purpose of an incest statute is "to protect society [not only] against the evils of inbreeding but also against the socially and morally undesirable consequences of sexual relations under any circumstances between persons within the prohibited degrees of relationship." *State v. Geddes*, 101 N.H. 164, 136 A.2d 818, 819 (1957).

out of wedlock or, in the case of incest, between heterosexual couples within prohibited degrees of consanguinity. They are not explicitly directed at sexual conduct which is inherently abhorrent regardless of the sex or relationship of the parties. Sodomy, indecent exposure, and indecent sexual acts with children, on the other hand, are offenses which focus on the nature of the sexual act or overture itself, proscribing sexual conduct on the outer reaches of immorality which is both unnatural and perverted. The sodomy, indecent exposure, and indecent sexual acts with children provisions are beyond the pale of constitutional attack.[16] The sexual acts encompassed by sodomy, set forth with grim clarity in § 22-3502, are characterized therein as "unnatural and perverted sexual practice[s] with a person or animal." The sexual conduct proscribed in § 22-3501—indecent sexual acts with children—includes "lewd and lascivious" acts upon or with the body or member of a child and the enticing of any child "for the purpose either of taking any such immoral, improper, or indecent liberties with such child . . . or of committing any such lewd, or lascivious act upon or with the body . . . part or member . . . of such child." We conclude that of the various forms of sexual conduct prohibited by the District of Columbia Code,[17]

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[16] *See Riley v. United States, supra* at 231 (sodomy); *Moore v. United States*, D.C.App., 306 A.2d 278, 281-82 (1973) (indecent sexual acts with children). We can find no reported case in which the constitutionality of the indecent exposure provision has been attacked. The indecent exposure clause of § 22-1112(a) codifies the common law crime of indecent exposure. *See generally Peyton v. District of Columbia*, D.C.Mun.App., 100 A.2d 36 (1953); 50 AM. JUR. 2d *Lewdness, Indecency, and Obscenity* §§ 17-18 (1970); 67 C.J.S. *Obscenity* § 5 (1950).

[17] In the District of Columbia adultery (D.C. Code 1973, § 22-301), indecent exposure (§ 22-1112), incest (§ 22-1901),

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only sodomy, indecent exposure, and indecent sexual acts with children can reasonably be deemed "lewd, obscene or indecent." The sexual proposal clause of § 22-1112(a) can thus be fairly construed to proscribe only proposals to commit sodomy, indecent exposure or, in the case of sexual proposals addressed to children, to perform some sexual act, and is not so vague as to amount to a deprivation of due process of law.

II

Appellees also argue that the statutory language at issue here is overbroad in that it impinges upon constitutionally protected speech. Under the "overbreadth doctrine," the sexual proposal clause of § 22-1112(a) can withstand an attack upon its facial constitutionality only if, as authoritatively construed by the courts of this jurisdiction, "it is not suspectible of application to speech, although vulgar and offensive, that is protected by the First and Fourteenth Amendments . . . ." [18] Even though the statute may be neither vague, overbroad or otherwise invalid as applied to the conduct charged against appellees, the appellees are permitted to question its unconstitutional vagueness or overbreadth if it is susceptible of application to the protected expression of others.[19] In these cases, however, it is unnecessary to look beyond the stipulated conduct of appellees since they contend

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fornication (§ 22-1002), seduction (§ 22-3001), indecent liberties with children (§ 22-3501), and sodomy (§ 22-3502) are criminal offenses. Rape (§ 22-2801) and solicitation to prostitution (§ 22-2701), while clearly sex related offenses, are by their very nature irrelevant to the present discussion.

[18] *Gooding v. Wilson*, 405 U.S. 518, 520 (1972).

[19] *See id.* at 521.

that the very speech for which they were arrested and charged is itself constitutionally protected.

The constitutional guarantees of freedom of speech forbid Congress to proscribe the use of words or language not within "narrowly limited classes of speech. . . . These include the lewd and obscene, and profane, the libelous, and the insulting or 'fighting' words—those which by their utterance inflict injury or tend to incite an immediate breach of the peace." [20] Since obscenity is still considered outside the area of protected speech, it is tempting to evaluate the actual words of the sexual proposals in the instant cases by established obscenity "tests." [21] However, the words used in these sexual proposal cases may or may not be obscene in themselves.[22] What matters is that the sexual acts proposed are lewd, obscene or indecent and lawfully prohibited by statute, not the character of the particular words in which the proposal is framed. It is the concept of solicitation, itself punishable as a crime at common law,[23] which removes proposals to commit sodomy from First Amendment protection. Thus, in *Riley v. United States, supra* at 233, we held that D.C. Code 1973, § 22-2701, when construed as prohibiting solicitation to commit sodomy, did not offend the First Amendment.

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[20] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (footnote omitted).

[21] *See Miller v. California*, 413 U.S. 15 (1973).

[22] *See Kaplan v. California*, 413 U.S. 115, 118-19 (1973) (obscenity can "manifest itself in conduct, in the pictorial representation of conduct, or in the written and oral description of conduct").

[23] *See Riley v. United States, supra* at 230-31.

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It is important to emphasize the precise nature of the speech which the sexual proposal clause of § 22-1112(a) proscribes. The principle is well established "that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [24] However, there is a significant distinction between advocacy and solicitation of law violation in the context of freedom of expression. Advocacy is the act of "pleading for, supporting, or recommending active espousal" [25] and, as an act of public expression, is not readily disassociated from the arena of ideas and causes, whether political or academic. Solicitation, on the other hand, implies no ideological motivation but rather is the act of enticing or importuning on a personal basis for personal benefit or gain. Thus advocacy of sodomy as socially beneficial and solicitation to commit sodomy present entirely distinguishable threshold questions in terms of the First Amendment freedom of speech. The latter, we hold, is not protected speech.

Appellee Hilliard also contends that § 22-1112(a) is unconstitutional "as applied to proposals to commit consensual sexual acts in private." Such an argument, however, is untenable in light of past decisions of this court. Section 22-1112(a) does not require an open or public act or proposal in the common-law sense and was not designed or intended to apply to acts committed or proposals made "in privacy in the presence of a single and

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[24] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). *See also Terminiello v. Chicago*, 337 U.S. 1, 4 (1958).

[25] *Gitlow v. New York*, 268 U.S. 652, 665 (1925).

consenting person." [26] While the sexual proposal to Officer Andrews was made by Hilliard in the apparent privacy of his parked automobile, it seems clear from the facts stipulated in the record that the officer was not a "consenting person." [27] Furthermore, the argument that Hilliard or any of the accused "ultimately may have contemplated a private and consensual act is of no legal significance. Any such hope or expectation by an accused may not in contemplation of law project him into a posture in which he can assert a right of privacy which arguably might arise from such a projected position." [28]

The orders of the trial court are reversed and these cases are remanded with directions to reinstate the informations.

GALLAGHER, *Associate Judge*, concurs in the result.

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[26] *Rittenour v. District of Columbia*, D.C.Mun.App., 163 A.2d 558, 559 (1960). *Cf. Harris v. United States*, D.C.App., 315 A.2d 569 (1974); *Herland v. District of Columbia*, D.C.Mun.App., 182 A.2d 362 (1962).

[27] We expressly do not decide here whether the officer's conduct amounted to entrapment, ~~a defense which was not raised below~~.

[28] *United States v. Carson*, D.C.App., 319 A.2d 329, 331 (1974).

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD SCHAEFERS, CHARLES A.S. HALL, WARREN S. COLISON and TERRY LEIGH, *Plaintiffs,*	:	
v.	:	**Civil Action No. 1821-71**
JERRY WILSON, Chief of Police, Metropolitan Police Department, and ROBERT L. DOLLARD, Director, Morals Division, Metropolitan Police Department, *Defendants.*	:	

STIPULATION FOR DISMISSAL

Pursuant to the provisions of Rule 41(a)(1) of the Federal Rules of Civil Procedure, it is hereby stipulated by the parties to the above-entitled action that D.C. Code § 22-3502 (Sodomy), when construed in light of the Constitution (see *Griswold v. Connecticut,* 381 U.S. 479 (1965)), prior decisional law in this jurisdiction (see *Rittenour v. District of Columbia,* 163 A.2d 558 (D.C. Mun. Ct. App. 1960)), and the legislative history of the statute, does not apply, and cannot be applied, to private consensual sexual acts involving adults (persons age 16 and over); and that the above-entitled action is therefore dismissed, each party to bear his own costs.

This stipulation shall not be construed as implying that D.C. Code § 22-3502 has been applied in the past by the defendants to private consensual sexual acts involving adults.

Dated: May 24, 1972.

/s/ DANIEL MARCUS
Daniel Marcus
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Washington, D.C. 20006
Attorney for Plaintiffs

/s/ STEPHEN SHANE STARK
Stephen Shane Stark
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